Rel: 08/14/2015

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-1199

William Collins

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-13-274)

WELCH, Judge.

William Collins was convicted of one count of first-degree burglary, a violation of § 13A-7-5 Ala. Code 1975, three counts of first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975, and one count of attempted murder, a

violation of §§ 13A-4-2 and 13A-6-2, Ala. Code 1975. Collins was sentenced to 30 years' imprisonment for each robbery and burglary conviction. Those sentences were to be served concurrently. For his attempted-murder conviction, Collins was sentenced to 35 years' imprisonment; that sentence was to be served consecutively to the other sentences. Collins filed a motion for a new trial, which was denied. This appeal follows.

On September 14, 2012, Claud and Cecelia Walker became victims of a home invasion by two black males at their house on Monticello Drive in Montgomery. Their housekeeper, Joanne Myrick, was also present in the house during the time. Myrick testified that she arrived at the Walkers' house at approximately 8:30 a.m. Shortly after she arrived, she began vacuuming the home office. After she finished vacuuming, she heard the doorbell ring. Myrick could see a red truck through the window. She also saw the reflection of a person standing in the front-door area, so she cracked the door open. A man came to the door, showed her some flowers, and said that he had flowers for Claud Walker. Myrick told the man "just a minute, let me go get Mr. Walker" and tried to close the door.

(R. 87.) The man pulled the door back, put a gun in her face, and pushed her further back inside the house. He pushed her into a chair and demanded to know where the money was. Myrick told him that she did not know where any money was. Myrick testified that the man "kept telling [me] if you don't tell me where's the money, I'm going to kill you." (R. 88.) The man kept asking about the money, and Myrick continued to tell him that she did not know where any money was. Each time she would respond, he would hit her. While the man was hitting her and demanding that Myrick tell him the location of the money, Myrick saw that another man had stepped inside the door. She could only see from that man's knee down to his feet. She rose up enough to see that the man was wearing what appeared to Myrick to be a mask like a mask a doctor wears. Shortly after the other man walked by, Myrick heard Mrs. Walker screaming in her bedroom. After the screams stopped, a man holding a gun, brought Mr. Walker out of the office and demanded to know where the money was. He shoved Mr. Walker down on the floor. Mr. Walker got up and went to the bedroom, and the men followed, dragging Myrick with them. When she got to the bedroom, she saw Mrs. Walker unconscious on the floor

surrounded by blood. Myrick thought that Mrs. Walker was dead. Myrick was placed on the floor next to Mrs. Walker while one of the men searched the house and went through the Walkers' belongings. The other man stood over the Walkers and Myrick with the gun pointed at their heads, threatening to kill them. He asked Mr. Walker for his rings and ordered Myrick to remove a ring from Mrs. Walker's finger. Mr. Walker was taken to the closet where the safe was breached. Soon after Mr. Walker opened the safe, the men heard an alarm and fled. Mr. Walker looked out the window and saw a truck. He telephoned emergency 911. During cross-examination, Myrick testified that Collins was the individual for whom she had opened the door that day.

Mrs. Walker testified that on the morning of the home invasion she was getting ready to take a bath when she heard her housekeeper scream. Mrs. Walker started toward the family room but was met in the hall by a black male. He had a pistol and started beating her head. Mrs. Walker testified, "I had my glasses on, and he beat my glasses off of me. He broke my nose with the pistol." (R. 116.) The man directed Mrs. Walker to lie down on the floor, and she lost consciousness.

Following the invasion, Mrs. Walker was transported to the hospital. All the bones in her face were broken. She required 200 stitches in her head, and she was in the hospital for five days. As a result of the assault, Mrs. Walker suffers from memory loss.

Mr. Walker testified that he was sitting at his desk talking to his daughter on the telephone when a black male entered the room with a gun. The man told Mr. Walker that he was going to kill him if Mr. Walker did not show him where the money was. He knocked the phone out of Mr. Walker's hand. Mr. Walker stood up and began going through his desk drawers. He pulled out some items and threw them on the floor. The man took some items and then put the gun to Mr. Walker's head and demanded to know where the money was. He said, "If you don't tell me, I'm going to kill you right here." (R. 131.) Mr. Walker told the man that he did not know what money the man was referring to but that he had a small amount of money in his safe in his bedroom. The man pushed Mr. Walker down the hall to the bedroom. When Mr. Walker went into the bedroom he saw his wife lying in a pool of blood. Mr. Walker testified, "She looked like she was dead." (R. 134.) The man kept

pushing Mr. Walker with the gun to his head, repeating, "I'm going to kill you; I'm going to kill you if you don't show me that money." (R. 134.) Mr. Walker went to the safe in the closet and opened it. The safe contained three $100 bills. The man took the money and ordered Mr. Walker back into the bedroom to lie down beside his wife and the housekeeper. The man told the other male inside the house to watch them because he wanted to check something. While that man went to the other room, the man who remained to watch over the victims said, "[W]e're going to kill you." (R. 135.) As the victims lay there, an alarm sounded. One of the men asked what the alarm was, and Mr. Walker answered, "[W]hen your partner knocked that phone out of my hand in the office in there, I had been talking to my daughter, and I'm sure she's called the police by now, and we're expecting them any minute." (R. 135.) The men fled the house. Mr. Walker testified that it was not his alarm that sounded and that he did not know whose alarm it was.

Officer M.D. Byner, currently with Hoover Police Department, but who had been working for the Montgomery Police Department at the time of the invasion, testified that he

heard a dispatch that a home-invasion robbery involving two black males had just occurred and that the men had left the scene in a red minivan. On a hunch, Officer Byner traveled toward the Troy Highway from his location. Soon thereafter, Officer Byner noticed a red minivan, occupied by two black males, traveling at a high rate of speed. Officer Byner activated his patrol lights. The driver of the minivan pulled into a driveway, and Officer Byner advised the driver to pull back onto the main road. The driver complied. Officer Byner waited on backup to arrive. Another officer responded, and Officer Byner approached the driver's side of the vehicle while he other officer approached the passenger's side. As the officers approached, the driver put the car into drive and accelerated down the road. The officers retreated to their respective vehicles and pursued the minivan. The minivan turned into Virginia Meadows Apartments and, near the entrance, both men got out of the van and ran. The officers chased the men. The men climbed a fence and went into a backyard. Officer Byner was able to catch the passenger and take him into custody, but the driver got away. The passenger was Elton Walton. The officer entered the tag number on the

van into a database but the result indicated that the tag was registered to a different van belonging to a church. The minivan's emblems, which displayed the vehicle's make and model, were covered with black tape. Officer Byner asked Walton who the driver was, and Walton said that the driver's name was Wilanu Collins. When Officer Byner had first stopped the mini van, the minivan had pulled into a driveway next door to Collins's parent's house.

Elton Walton testified that on September 14, 2012, Collins telephoned him early that morning asking him if he was ready to go rob the Walkers. According to Walton, the men had discussed robbing the Walkers for approximately three weeks prior before the robbery. Walton testified that Collins was familiar with the Walkers because Collins's uncle had built a deck for the Walkers, and Collins had worked for his uncle. Walton got out of bed and waited on Collins to come get him. A short time later, Collins knocked on Walton's door. After the men left Walton's residence, they went to Collins's house. They sat for a while and then Collins asked Walton if he was ready and to get the book bag that contained zip ties and a crowbar. They also got some flowers as a ploy to get inside

the Walkers' house. While Walton sat in Collins's mother's red minivan, Collins applied duct tape to the minivan in an attempt to hide the make of the van. Collins also changed the tag on the minivan. Collins drove to the Walkers' house. Walton knocked on the door while Collins remained inside the minivan. Walton testified that the housekeeper came to the door and that he pushed her. Collins then entered the residence, and Collins went to another room where he struggled with Mrs. Walker. Walton demanded that the housekeeper tell him where the money was, and he hit her several times. Collins got Mr. Walker from his office and brought him to the front of the house. They went to the safe in the bedroom. Mrs. Walker was unconscious. Walton demanded money and a ring from Mr. Walker. He held his gun on the Walkers and the housekeeper while Collins rummaged the rear of the house. When Collins came from the rear of the house, they got into the minivan and left. They were going to Collins's mother's house when a patrol car got behind them. They stopped, and when a second patrol car arrived and the police got out of the cars, they drove away. The officers pursued them. Collins

eventually stopped the minivan, and the men jumped out of the minivan and ran.

Lashon Peterson, Walton's girlfriend, testified that on September 14, 2012, she was living in Stonebridge Apartments with her three children and Walton. Collins telephoned that morning around 6:15 a.m., and then, about 15-20 minutes later, Collins came to the apartment in a burgundy van.

Detective G.A. Schnupp with the Montgomery Police Department testified that on September 14, 2012, he was asked by Detective A.D. Gorum to respond to 4100 Fitzpatrick Boulevard, Virginia Meadows Apartments, in reference to a pursuit of a vehicle from which two subjects had bailed. (R. 291.) Det. Gorum wanted Det. Schnupp to go to the scene, photograph the vehicle, and read the subject in custody his rights. When Det. Schnupp arrived at the scene he saw multiple patrol units surrounding a red minivan. Duct tape covered the emblems of the van on the back, side, and front of the vehicle. (R. 292.) Det. Schnupp entered the tag number of the minivan in a database, which reflected that the tag did not belong to the vehicle. The tag belonged to a different van registered to St. James Baptist Church Holt-Crossing. The

tag that should have been on the minivan reflects that the 2005 red Saturn Relay van was registered to Willie Collins. A silver revolver was found on the driver's side floorboard. On the passenger-side floorboard was a hundred-dollar bill, an envelope, a watch, and wallet with photo identification belonging to Mr. Walker. The center console contained a blue respirator mask and a package of cigarettes. A black book bag was found on the floorboard of the backseat. Zip ties, a gun clip with rounds, and a crowbar were inside the book bag. Underneath the rear passenger seat was a black semiautomatic handgun. A bouquet of flowers was found on the rear floorboard of the vehicle. DNA found on the silver gun was tested and matched that of Mrs. Walker. A fingerprint was found on the tape covering the emblems of the van, and the fingerprint was determined to belong to Collins.

Detective A.E. Magnus with the Montgomery Police Department testified that a search of Collins's residence revealed black duct tape and a cellular telephone that showed Internet searches had been conducted in reference to Mr. Walker. Video from a red-light camera at the intersection of Bell and Vaughn Roads showed the red minivan traveling through

that intersection at approximately 9:25 a.m. on September 14, 2012. Walton, who had been stricken with a taser gun during his apprehension, was taken to the hospital, where Mr. Walker identified him as one of the assailants who had entered his residence.

The defense called several witnesses at trial. One witness, Det. Magnus, testified that, according to cellular telephone records, Walton attempted to call Collins a few times the morning of the robbery, at 7:49 a.m., at 8:00 a.m., and again 40 seconds later. Walton's fourth call was accepted. Det. Magnus also testified that in Walton's statement to the police, Walton said that it was Collins who went to the door with the flowers and who pushed the housekeeper. Walton told the police that Walton was in possession of the black gun and that Collins was in possession of the silver revolver.

The defense called Walton back to the stand. Defense counsel asked Walton: "Have you ever made a statement to Mr. Collins that folk protect folk or disciples protect disciples, that that's why you were doing -- testifying in this case the way you have against Mr. Collins?" (R. 598) Walton admitted

to being a member of a street gang called the "Disciples," but testified that the gang had nothing to do with "this." (R. 599.)

Collins testified on his own behalf. He testified that on the morning of September 14, 2012, he was supposed to pick his mother up and take her to work. He had talked to Walton the day before. They were supposed to go to turn in an application at a temporary-employment service. Collins stopped by Walton's house before he went to pick up his mother to see if Walton was still going. According to Collins, Walton did not have a telephone so Walton would occasionally come to Collins's house to use his telephone. Walton used the Internet on the telephone to check his social-media sites. On the morning of September 14th, Collins took his mother to work and went back home. Collins saw that Walton had telephoned him, so Collins went to Walton's apartment.[1] When Collins arrived, Walton was standing outside in the parking lot.

[1]Collins's testimony appears to indicate that he had the capability to identify the caller of a telephone call he had missed. Collins testified that Walton did not have a telephone; however, he later testified that he had missed a telephone call from Walton. The record does not indicate whose telephone Walton used to telephone Collins or why Collins believed that it was Walton who had telephoned him.

Walton was with a male whom he introduced to Collins as his cousin, "Q." Walton and Q asked Collins to take them to a house off Bell Road. Collins initially agreed but then changed his mind after seeing that Walton had a gun. He told them that they would have to find another ride to the house. Collins testified that Walton convinced him to let Walton use the van, and the men dropped Collins off at the Bell Road YMCA around 8:45 a.m. About 30 to 45 minutes later, Walton came back to pick Collins up. Walton was alone, so Collins assumed that Walton had dropped Q off at Q's girlfriend's car at the Winn Dixie grocery store on the Atlanta Highway. When Collins got in the driver's seat of the van, he noticed a lot of debris and trash all over the floor and a revolver lying on the floor. Collins asked what had happened to the van, and Walton responded that Collins needed to get the van off the road. Walton's shirt was unbuttoned; he was sweating; and he appeared nervous. Walton told him that his cousin "flipped out." (R. 646.) Walton wanted Collins to take him to his apartment, but Collins told him that he was going to take the van back to his mother's house and that they were just going to have to part ways from there. Collins testified that he

pulled into the driveway next door to his mother's house because Walton was panicking. He drove away after the police arrived because he was scared. Walton was in the passenger seat holding a black handgun, and, at the time, he thought Walton might try to have a shootout with the police. After he drove off, he turned onto the first street to the right because, Collins testified, "I wasn't really trying to go on a run, you know in the car from the police. ... So I turned into the Fitzpatrick Boulevard into those apartments, and I jumped out of the car ... and ran from everything, the situation, the police officer, [Walton], the whole thing." (R. 650.) Collins hid in a shed in his backyard for several days before he turned himself into the police. Collins testified that, during that time, he was under the assumption that Walton had killed someone in the house.

Collins testified that there was a license plate in the van that was registered to a van belonging to his father's church but that at the time he did not realize that the license plate belonged to the other van. He thought that the license plate in the van was an older license plate for his mother's minivan. Collins denied that he put the license

plate on the minivan and claimed that Walton and Q must have put the license plate on the van after they dropped him off at the YMCA. Collins testified that he thought Walton and Q were going to fight with someone over money so he put the duct tape over the emblems of the van so there would not "be any retaliation if the guy got into a fight with whose house we went to whether my parents were driving the van or if I was driving the van." (R. 654.)

On appeal, Collins argues that the evidence was insufficient to corroborate the testimony of Walton -- his accomplice -- to support his conviction for attempted murder.[2] Collins also contends that the trial court erred when it denied his attempt to impeach Walton's credibility through the use of extrinsic evidence. Because we are reversing the trial court's judgment on the basis that the trial court erroneously denied Collins's attempt to impeach Walton through the introduction of extrinsic evidence, we pretermit discussion of the sufficiency issue.

[2]Collins does not challenge his other convictions on this ground.

During the defense's case, counsel called Marvin Gaston as a witness. While in a holding cell in the county jail, Gaston had allegedly overheard a conversation between Collins and Walton. When, during direct examination, defense counsel asked Gaston about what he had heard, the State objected on the ground that the testimony was hearsay. Defense counsel stated: "Judge, I apologize, but I will just -- we'll just have to put the other witness on first, and then we'll bring him back in for impeachment." (R. 585.) Defense counsel eventually called Walton back to the stand and asked Walton if he was trying to protect someone. Walton denied the assertion. Defense counsel then asked: "Have you ever made a statement to Mr. Collins that folk protect folk or disciples protect disciples, that that's why you were doing -- testifying in this case the way you have against Mr. Collins? Have you ever made that statement? (R. 598.) Walton responded that the gang, the Disciples, did not have anything to do with "this." (R. 599.)

Later that evening of trial, the following occurred outside the presence and hearing of the jury:

> "THE COURT: What I was going to tell you, why don't we -- let's go ahead and get this on the

record. And, like I said, I'll let you brief it. But why don't you go ahead and put it on the record, Ms. James [defense counsel], what you are attempting to do?

"MS. JAMES: Okay. And, Judge, Mr. Perry says maybe some of our side bars weren't on the record.

"THE COURT: Sure.

"MS. JAMES: So we just kind of wanted to go back and memorialize a couple of those.

"THE COURT: And that's fine.

"MS. JAMES: Okay. Judge, as I articulated at the bench earlier when I put Mr. Gaston on, I was trying to set up his testimony that he's really an unbiased person that has happened to run into both Mr. Collins and Mr. Walton in the holding cell at the jail.

"THE COURT: Right.

"MS. JAMES: So we put -- we put Collins -- not Collins. We put Walton on the stand, and he denied it. He said he did not have such conversation with anyone in the jail.

"And I believe that it would be no different than someone getting on the stand, let's say, that the police had interviewed. Okay. They get on the stand, and they say something contrary to what the police officer reports.

"THE COURT: But this is my point. As I told you, I have no problem with you getting Mr. Gaston on the stand and asking Mr. Gaston you were held in the holding cell with some other people? Yes. And was Mr. Collins there and Mr. Walton? Yes, they were. Did you see them talk? Yes. Did you see anything else? Yes. I saw him throw a gang sign.

"That, I have no problem with.

"MS. JAMES: And his question.

"THE COURT: Right. But if you ask him what did they say, well, yeah. Because you want the jury to hear what he's saying because you're offering it for the truth of the matter, which is exactly a violation of the hearsay rule, and there is no exception on that.

"I mean, you haven't told me one.

"MS. JAMES: Right. And that's why I asked for time tonight since, particularly, in light of your letting us go --

"THE COURT: Right.

"MS. JAMES: -- that we at least be able to look at it.

"THE COURT: And I will. I'll let you -- I mean, if you can find an exception legally, you know, I'm following the law, which is my job, and I'm going to follow the law. Right now, you haven't given me an exception.

"MS. JAMES: I understand.

"THE COURT: If you find one, fine. And I'll give you until in the morning to do that."

(R. 608-11.)

On the next day, the following proceedings were held:

"THE COURT: Ms. James, I think we wanted a chance to look up some law.

"MS. JAMES: We do. Mike [Perry, cocounsel,] is going to address it. We showed the prosecutor.

"THE COURT: Okay. Go ahead with whatever you need to say.

"MR. MIKE PERRY: We -- it's my understanding that the substance of this argument that Ms. James was making was we had attempted to -- we made an argument that we were attempting to use the testimony of Marvin Gaston to impeach Mr. Walton's testimony.

"Yesterday, Mr. Walton was brought back out here. We asked Mr. Walton about specifically the question of whether he was attempting to cover for a third person, whether he had made the statement that he was doing this out of a gang affiliation.

"Mr. Walton denied all of those statements. He was asked about the identity of a man named Q who, during our investigation, we have determined that that person's name is the third person that we believe is involved in this -- well, was involved in this incident.

"He denied all of those statements. He left the stand. We attempted to bring Mr. Gaston back, and at that time we sought to introduce testimony that would establish that, yes, in fact, a statement was made that Mr. Gaston heard that established that. Mr. Walton did say that he was -- he indicated that he was making -- he was making false statements in order to protect a gang buddy or a third party.

"At that time the State approached. We approached. The State said this is rank hearsay. We stated this is impeachment.

"All right. Your Honor, we're saying and we're standing firm on the assertion that we are not offering this for ... hearsay ... We're not offering for the truth of the matter asserted.

"THE COURT: But you are.

"....

"THE COURT: It is hearsay, and you are offering it for hearsay.

"MR. PERRY: Well, no, I'm not.

"THE COURT: Then tell me why it's an exception.

"....

"MR. PERRY: Okay. It's not an exception. It's impeachment. It's in no way hearsay. Now, whether it's being offered for the truth of the matter asserted, in my view, it does sound confusing because it sounds like we're offering it for the truth of the matter asserted.

"We are not. We're offering it for impeachment and to establish bias that Mr. Walton has come up here and he has said things that were not true when, in fact, his bias is that he is protecting people.

"THE COURT: Well, and this Court's point, it is hearsay. However, as I told y'all yesterday, I have no problem with you getting Mr. Gaston back on the stand and you asking Mr. Gaston did you hear a conversation between ... the defendant, Mr. Collins, and Mr. Walton. And he can say yes. And then you can say where were you. Well, we were over in the holding cell. Now, don't tell me what he said, but did you see anyone do anything? And he could say I saw him throw a gang sign. That's it.

"MR. PERRY: But they were in separate cells.

"THE COURT: But that statement is being offered for the truth of the matter asserted. That is exactly why it's being offered.

"And I'll tell you why I know it even more. Because you want them to hear exactly what he said.

That's the importance of it. Okay. Because if it wasn't, you would say, you're right, Judge, is all we need to show is there was a conversation. A gang sign was thrown. We're good with that. But you want the content of that conversation getting before that jury because that's exactly why you need it. It's for the truth of the matter asserted. And that is total hearsay.

"MR. PERRY: Your Honor, if we can just cite a case in support of our oral argument.

"THE COURT: Yes, that's fine.

"MR. PERRY: This is Williams v. State, 710 So. 2d 1276. The statement -- in this case the principle of law that's put forth by the Alabama Court of Criminal Appeals 1996 is it is always -- it is always permissible to -- and mind you, this particular case was dealing with a State's witness where the -- the argument was whether they could use extrinsic evidence to show bias of an accused witness in favor -- an accused witness who was testifying in favor of the accused or against the State.

"All right. In this particular case, we are using an adverse witness, a witness who the State has brought up here and is attempting to testify against Mr. Collins.

"The principle is the same though. It is extrinsic evidence of a prior inconsistent statement. It is always permissible to question a witness to ascertain his or her interest, bias, prejudice, or partiality concerning matters about which he or she is testifying. And, generally, anything that tends to show the witness's bias, unfriendliness, enmity, or inclination to swear against a party is always admissible.

"Your Honor, this is impeachment testimony. It's offered not for hearsay. We are offering it to show established bias. We argue that the Williams case should allow us to let the jury because this is the only communication. There are no signs. We don't even know if they were in the same room together. All that was heard were these words. That's all that we have to show bias.

"THE COURT: That isn't what you said yesterday. I thought you said that what Mr. Gaston would testify to was he heard --

"....

"THE COURT: -- he saw Mr. Collins come in and say why are you doing this to me, man, and Mr. Walton then threw a gang sign and said, hey, we've got to -- we disciples got to stick together or whatever he said.

"MR. PERRY: Ms. James could --

"THE COURT: That was yesterday if I remember.

"MR. PERRY: -- could confirm that portion of Mr. Gaston's testimony. She's briefed him and has understood what he would say. But it's my understanding that the communication is the words that were expressed. That's really all that was expressed here to show bias.

"THE COURT: Well, I mean, I'm just saying I thought y'all said yesterday -- but maybe I misunderstood that, but it is hearsay. But, State, do you want to respond?

"[Prosecutor]: We don't have any response other than what we said yesterday.

"THE COURT: All right. Ms. James?

"MS. JAMES: Judge, just to add to that, do you want to know what he said or --

"THE COURT: No. I just was -- I thought you had said yesterday that when he saw him, he said he saw a gang sign thrown by Mr. Walton who said, hey, we disciples got to stick together. Isn't that what was said yesterday?

"MS. JAMES: Yes, it was in response to a question from Mr. Collins. He said something to the effect of why are you doing this to me.

"THE COURT: Right.

"MS. JAMES: And then Gaston overheard -- saw him do that and said we disciples have to stick together.

"THE COURT: Yes. And that's what I'm saying. I don't have any problem with you guys asking him did you hear a conversation. Yes. Now, don't tell me what was said, but did you see anything besides hear the conversation. And if he says, yes, he threw a gang signal, that's fine.

"Okay. But I'm not going to allow the content of that conversation because it is classic hearsay. I don't agree on the impeachment. That is improper, and I'm not going to allow it. But I will note your objection.

"MS. JAMES: Judge, two things adding to the objection would be a Sixth Amendment confrontation violation. But we would contend that -- but in addition to that, I expect that we will with your permission call Mr. Gaston with the limitations that you've placed on that. I probably have a few other questions to ask, but --

"THE COURT: Sure. And that's fine.

> "MS. JAMES: But then at the appropriate time, I would like to just ask him what he would say if that question were asked so we have a clear record and not my interpretation of what was said."

(R. 621-29.)

At the conclusion of all the testimony presented by the defense, the defense rested, subject to making a proffer of Gaston's purported testimony. Outside the presence of the jury, defense counsel called Gaston to the stand. Gaston testified that while he was in a holding cell in the county jail he heard Collins ask Walton why Walton had implicated Collins in the offenses even though Collins was not there. Gaston testified that Walton responded that "disciples don't betray disciples." (R. 696.) Following this testimony, defense counsel again renewed her request that Gaston be allowed to testify to those facts. The trial court denied the request.

> "When a witness, on cross-examination, denies having made a statement out of court which is inconsistent with the witness' testimony on direct examination, the only available move for the impeaching party is to bring on extrinsic proof--either in the form of writing, tape recording or impeaching witness who can testify as to the prior inconsistent statement. Before such extrinsic evidence may be elicited, however, it is the general rule that the impeaching party must lay a proper predicate by asking the witness being impeached

> whether such a statement was made, specifying with reasonable certainty the time, the place, the person to whom such supposed statement was made and the substance of the statement. The witness likewise must be given an opportunity to admit or deny having made the statement. This foundational requirement is continued under the Alabama Rule of Evidence:
>
> "'Rule 613. Prior Statements of Witnesses.
>
> "'....
>
> "'(b) Extrinsic evidence or prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity to admit or deny having made it....'"

Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence § 157. 01(1)(b)(6th ed. 2009) (footnotes omitted).

Here, defense counsel asked Walton if he had ever made the statement. Walton denied making such a statement and said that his gang affiliation did not have anything to do with the case. Thus, Walton was confronted with the inconsistent statement. Although defense counsel did not confront Walton with particularity regarding the time or place of the prior statement, the State did not argue as a basis for their objection to the testimony that the proper predicate had not

been laid. Furthermore, the rule "does not require precision in the predicate question with respect to the content of the supposed statement, the time when, the place where, or the person to whom made." McElroy's Alabama Evidence § 157.01(3)(footnote omitted).

> "The basic reason for the requirement that the predicate question specify time, place, content of the supposed statement, and the person to whom made, is to enable the faculties of the mind of the witness to be put in motion with memory aided by the train of ideas which such circumstances would be likely to suggest in reference to the subject matter under inquiry and thereby be aided in recalling to memory whether the witness made the statement; and, if the witness recalls making it, to give an explanation of the apparent conflict between the witness' testimony and such prior statement. In a word, the requirement is a matter of fairness."

McElroy's Alabama Evidence § 157.01(2)(footnote omitted).

Although defense counsel did not specify the time or place of the inconsistent statement when she asked Walton whether he had ever made such a statement, from our review of the record we find that Walton understood that defense counsel was referring to a statement he had made in reference to whether he was implicating Collins in the offenses to cover for one of his gang members. Neither Walton nor the State asked for more particulars.

Contrary to the trial court's finding, an inconsistent statement by a witness who is not a party, whether testified to by the witness during questioning or proven extrinsically through another witness, generally operates to impeach or discredit the witness and is not substantive evidence of the matter asserted. The statement is being offered merely to show the inconsistency; thus, the statement is definitionally nonhearsay. See McElroy's Alabama Evidence § 157.02(1). See also Rule 801(c), Ala. R. Evid. The statement is being offered to prove that the witness said something in the past that is inconsistent with what the witness now states. As such, it is recommended that the trial court give jury instructions that the inconsistent statement is to be considered only for the limited purpose of impeachment and not as evidence of the truth of the matter stated therein. Id. We acknowledge that some inconsistent statements may constitute substantive evidence as to the truth of the matter asserted; however, those statements must meet certain requirements. Usually these statements must be an admission or must have been given under oath subject to penalty of perjury at a trial, hearing, or other proceeding. Id. In

those situations, the inconsistent statement can be used as both impeachment and substantive evidence.

In this case, defense counsel was attempting to impeach Walton with a prior inconsistent statement by having Gaston testify as an impeaching witness. Gaston's proffered testimony should have been allowed into evidence as impeachment evidence, and the trial court erred when it refused to allow the testimony into evidence. Given that the evidence in this case was based in large part on Walton's accomplice testimony and the fact that Collins testified on his own behalf and denied his presence at the Walkers' house, the jury was required to make many credibility determinations in reaching its verdict. Therefore, we cannot say that such error was harmless.

Based on the foregoing, the trial court's denial of Collins's request to introduce Gaston's testimony constituted reversible error, and the judgment is due to be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Kellum and Burke, JJ., concur. Windom, P.J., and Joiner, J., dissent, without opinion.